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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TYNDALL JAMES MIRACLE, Defendant and Appellant.	D059949 (Super. Ct. No. SCS244020)

APPEAL from a judgment of the Superior Court of San Diego County, Kathleen M. Lewis, Judge. Sentence vacated with instructions.

Tyndall James Miracle pleaded guilty to driving under the influence (DUI) of alcohol (Veh. Code, § 23152, subd. (a), count 1); driving while having a blood alcohol content of .08 percent or higher (*id.*, subd. (b), count 2); and engaging in a motor vehicle speed contest on a highway (§ 23109, subd. (a), count 3).

On appeal, Miracle claims, among other issues, that the sentencing court erred in not holding a hearing, pursuant to then-applicable Penal Code[1] section 1170.9 (Stats. 2006, ch. 788, § 2) (former § 1170.9), whether he may be suffering from post-traumatic stress disorder (PTSD) as a result of his military service and if so, whether he was entitled to alternate sentencing under that statute.

As we explain, we agree with Miracle that before sentencing he was entitled to a hearing under former section 1170.9. We thus reverse his sentence and remand for resentencing, if necessary, consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On October 30, 2010, Miracle responded to a challenge to race by another driver. He subsequently was stopped by the California Highway Patrol for traveling at speeds of up to 115 miles per hour. His measured blood-alcohol level was .17 percent.

The San Diego County District Attorney filed an information charging Miracle with three counts. Miracle admitted he: (1) had been convicted of a felony DUI within 10 years of the commission of the offense, within the meaning of Vehicle Code sections 23626 and 23550.5, subdivision (a); (2) had been convicted of three or more DUI's within

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1 All further statutory references are to the Penal Code unless otherwise specified. A 2010 amendment to former section 1170.9 made changes that became effective January 1, 2011, *after* Miracle committed the offenses at issue here. (See Stats. 2010, ch. 347, § 1.) Those changes are not relevant to our discussion here.

2 We view the evidence in the light most favorable to the judgment of conviction. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.)

10 years of the commission of the offense, within the meaning of Vehicle Code sections 23626 and 23550, subdivision (a); and (3) had, during the commission of the offense, driven a vehicle 30 or more miles per hour over the posted speed limit, within the meaning of Vehicle Code section 23582, subdivision (a).

As relevant to this appeal, before sentencing Miracle requested in his statement in mitigation and in support of probation (statement) consideration of punishment in accordance with former section 1170.9. This statute, discussed *post*, affords a defendant a hearing before sentencing to determine whether the defendant suffers from one or more conditions listed in the statute as a result of his or her military service and if so, whether the defendant committed the charged offense or offenses as a result of one or more of those conditions. Miracle did not receive this hearing before the court sentenced him to two years in state prison.

DISCUSSION

Miracle claims the trial court erred in not holding a hearing before sentencing as required under former 1170.9.[3] The People argue that Miracle did not properly raise the applicability of the statute before he was sentenced.

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[3] Former section 1170.9 provided in part: "(a) In the case of any person convicted of a criminal offense who would otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of post-traumatic stress disorder, substance abuse, or psychological problems stemming from service in a combat theater in the United States military, the court shall, prior to sentencing, hold a hearing to determine whether the defendant was a member of the military forces of the United States who served in combat and shall assess whether the defendant suffers from post-traumatic

Subdivision (a) of former section 1170.9 provided that where a defendant "alleges" that he or she committed an offense as a result of, among other conditions, PTSD stemming from service in a combat theater in the United States military, the court *shall*, before sentencing, make a determination whether the defendant was suffering from PTSD when he or she committed the offense. Subdivision (b) of former section 1170.9 gave the sentencing court discretion to place a defendant into a specialized program if the defendant was eligible for probation.

In evaluating the statute and its requirements, we look to the words of the statute for guidance, " 'giving them a plain and commonsense meaning. [Citation.]' " (*People v. Lewis* (2008) 43 Cal.4th 415, 491.) If the statutory language is unambiguous, the plain meaning controls. (*People v. King* (2006) 38 Cal.4th 617, 622.)

We conclude the words of former section 1170.9, subdivision (a) are clear and unambiguous: once a defendant *alleges* he or she may be suffering from one or more statutory conditions as a result of service in a combat theatre in the United States military and committed the charged offense or offenses as a result of one or more of those conditions, the court *shall* hold a hearing before sentencing to determine whether the

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stress disorder, substance abuse, or psychological problems as a result of that service. [¶] (b) If the court concludes that a defendant convicted of a criminal offense is a person described in subdivision (a), and if the defendant is otherwise eligible for probation and the court places the defendant on probation, the court may order the defendant into a local, state, federal, or private nonprofit treatment program for a period not to exceed that which the defendant would have served in state prison or county jail, provided the defendant agrees to participate in the program and the court determines that an appropriate treatment program exists." (Stats. 2006, ch. 788, § 2.)

defendant is entitled to benefits under former section 1170.9, subdivision (b). (See *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1089 ["To come within the applicable version of section 1170.9, the following conditions must be satisfied: (1) the defendant must have served in combat while a member of the United States Armed Forces; (2) the defendant must suffer from PTSD, substance abuse, or psychological problems as a result of that service; (3) the defendant must be eligible for probation; (4) the court must place the defendant on probation; (5) there must be an appropriate local, state, federal, or private nonprofit program that can treat the defendant; and (6) the defendant must agree to participate in that program. If those requisites have been met, the trial court then has *discretion* to order the defendant into the treatment program for a period not to exceed that which he would have served in prison. [Citation.]"].)

Here, before sentencing, Miracle in his statement claimed that he "was enlisted in the United States Navy in 1994 and received a General Under Honorable conditions discharge, while in custody on his third DUI, in 2008." He further claimed he "participated in eight deployments into 'combat theatres' during his fourteen years with the Navy and . . . witnessed some extremely gruesome events during his service. As a result, he likely suffers from Post Traumatic Stress Disorder, although he has yet to be formally evaluated or diagnosed" with that condition.

The record further shows that Miracle cited to former section 1170.9 and quoted a portion of this statute in making the above allegations in his statement, and that in the conclusion of his statement he asked for a formal hearing under former section 1170.9 if

the trial court was disinclined to grant him probation. Although not a model of clarity, we conclude the allegations in Miracle's statement are sufficient to trigger the benefits afforded veterans under former section 1170.9.

The trial court here denied Miracle probation and sentenced him to prison. Because it appears from the record Miracle satisfied the requirements of former section 1170.9, we conclude he was entitled to a hearing before sentencing.[4]

DISPOSITION

Miracle's sentence is vacated. The case is remanded for a hearing under former section 1170.9 and resentencing, if necessary.

BENKE, J.

WE CONCUR:

McCONNELL P. J.

HALLER, J.

4 In light of our decision, we deem it unnecessary to address Miracle's other claims in this appeal.